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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CHARLES E. FAIRCLOTH,

Petitioner,

VS.

NORFOLK AND WESTERN RAILWAY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, FIRST DIVISION

JOHN J. NAUGHTON,
30 N. LaSalle Street,
Suite 2100,
Chicago, Illinois 60602,
(312) 782-5925,

Counsel of Record.

ROBERT E. HARRINGTON,
HARRINGTON & HARRINGTON, LTD.,
HENSLEE, MONEK & HENSLEE,
30 N. LaSalle Street,
Suite 2100,
(312) 782-5925,

Of Counsel.

April, 1981

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QUESTIONS PRESENTED

Whether a Federal Employers' Liability Act judgment for a railroad which presented no evidence, rejecting a claim of an unsafe place of work and conflicting with this Court's safe place to work decisions should stand.

Whether the Appellate Court denied the plaintiff due process of law when it decided non-existent questions and failed to decide the questions raised on appeal.

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REFERENCE TO REPORTS

The Opinion of the Appellate Court of Illinois, First District, First Division is reported at 89 Ill. App. 3d 923, 414 N.E. 2d 634 (1980) and is appended hereto at pages A-1 through A-10. The order and mandate of the Supreme Court of Illinois denying Petitioner's Petition for Leave to Appeal appears at pages A-11 through A-12.

JURISDICTION

The judgment of the Appellate Court of Illinois, First District, First Division was entered on October 23, 1980. Petitioner's timely Petition for Leave to Appeal was denied by the Supreme Court of Illinois on January 30, 1981 and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

STATUTORY PROVISION FOR JURISDICTION

62 Stat. 929 as amended 28 U.S.C. § 1257(3)

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."

STATUTES AND CONSTITUTION INVOLVED

35 Stat. 66, as amended, 45 U.S.C. § 51.

"*Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.*

"Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then

of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

U.S.C.A. Const. Amend. 14, § 1, which reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF FACTS

This is a FELA case against the Norfolk & Western Railroad Company resulting from two accidents suffered by the plaintiff while working for the railroad. As to each accident, the only evidence presented was part of the plaintiff's case. The trial court refused to set aside the verdicts in favor of the railroad. On appeal, the Appellate Court, in a confusing Opinion, affirmed the judgment.

In so doing, it decided several questions never presented by the plaintiff-appellant. First, it decided that ". . . Even under the manifest weight standard urged by Faircloth, we do not believe the trial court abused its discretion in denying his motion for a new trial." (A. 7). The manifest weight "standard" was urged by plaintiff as an independent question which was exclusively for the Appellate Court. Second, it decided that it was ". . . not persuaded that the trial judge believed he had no authority to exercise discretion or he refused to exercise his discretion." (A. 9). Plaintiff never so claimed except as a theoretical possibility existing solely because the trial court's statements were so meaningless.

The Accident of January 2, 1974

The first accident was suffered by the plaintiff as a relief employee for a crew working in the Front Street yards. The plaintiff was called to work with the crew as a switchman after a member of the original crew became ill and went home (R. 92, 93). On the second move made after the plaintiff joined the crew, Conductor Fuller instructed the plaintiff to tie onto a string of cars and to

pull those cars on to the lead track. Plaintiff was instructed that the first move would be a 3 car kick (R. 85 through 98).

Plaintiff was told to grab hold of the car and stay on the ground and hold onto the cutting lever to make sure that the pin stayed up. The pin will usually stay up except when track conditions will cause it to fall down. If this occurs, the movement has to be stopped and restarted all over again (R. 99). The plaintiff was unfamiliar with the yard and did not really know the last time he had worked in that yard (R. 98). He followed the directions of the Conductor and responded to a question that he was set. The Conductor gave a kick sign and the engine started shoving, gathering up the slack and causing the cars to roll. The plaintiff had his hand on the grabiron and as he reached for the operating lever he was not certain if he got his hand on it or not. The last thing that he could remember was the cars coming at him. (At the time of trial, he could remember that he went in between the cars). The next thing he knew was that he was lying on his back away from the cars (R. 100).

After he landed on his back, he could remember opening his eyes and seeing several men around him. He felt hurt all over. He was taken from the yard to the St. Charles Hospital where they x-rayed his head and left leg. He was at the hospital for 5 or 6 hours before he was told to go home, stay in bed, and contact his family doctor (R. 101, 102). Surgery was performed on his left knee before he returned to work (R. 105). That knee was operated on for a second time in November of 1975 (R. 120).

Mr. Fuller testified that the condition of the track in the immediate area in which the accident occurred was very poor on high and low joints. The ties were in very

poor condition and a number of derailments had taken place. Mr. Fuller had seen two high-low joints on that track prior to the accident (R. 32). He knew that those high-low joints existed at the time the cut had been made and that they had been there 5 to 6 months prior to the accident. In the area where the accident happened, there had been 35 derailments on that track in 45 days (R. 33). These would be reported on a form. The Conductor had filled out those forms so many times that he was sick and tired of filling them out.

He testified it was his responsibility to start and stop the movements. Just before the movement, he informed the crew what he intended to do. He made sure that Mr. Faircloth was ready and then he gave the kick sign. He saw Faircloth with his hand on the grabiron of the car to support himself while raising the operating lever. The Conductor saw the plaintiff disappear between the cars. He immediately gave a signal to try to stop the movement when he saw plaintiff come shooting out. He thought the plaintiff must be unconscious because he made no effort to protect himself and landed right on his head. He ran up to him and held up 3 fingers and inquired how many fingers. Faircloth said 6 with a big smile on his face. The Conductor told the plaintiff to stay there and ran to a telephone to get an ambulance (R. 35, 36).

When the plaintiff took hold of the grabiron and reached in to cut off the car, the Conductor saw that they were going over this low joint and the cars were violently swinging back and forth. The Conductor saw that the plaintiff was right at the low joint as he reached in to lift the operating lever. The cars were going 5 to 7 miles per hour and would not become uncoupled (R. 36, 37). After the acci-

dent, he inspected the cars and found that there was nothing the matter with them. He knew approximately how far east the 3 or 4 cars stopped from the high-low joint. He thought that all 3 cars never got by the high-low joint.

A high-low joint is caused when, through the years, the ballast beneath the rails is washed away and then the tie from working motions back and forth is caused to eat into the ground. Eventually you can have as much as a 12 inch drop. Thus, when a car moves across the joint the weight of the car causes it to make a violent sudden action toward this hole. The track looks like it is okay until heavy loaded railroad cars run over it. A high-low joint causes a violent lateral action of the railroad cars as they run over it (R. 24, 25).

The Conductor did not warn the plaintiff not to make the cut at the low joint (R. 57). On redirect examination the following question and answer were given (R. 59).

> Q. It is necessary to run alongside of a car when you are making a cut movement like this?
>
> A. Not necessarily so. Without the low joint, no, sir not necessary.

THE ACCIDENT OF MAY 6, 1976

On May 6, 1976, plaintiff was working with a crew in the Homestead yard. He discussed the work to be done with the Conductor in the railroad yard office and then went out to work. He went to his engine which was located on the No. 3 track about even with the No. 5 switch as he came out of the yard office. He had to cross No. 5 and No. 4 track to get to the engine. He was going to talk to the engineer, but his window box was closed so he walked around the front of the engine, banged on the fireman's side and told him they were going to go down through the yard. He

walked toward the main to check on some cars. He made a turn to come back to meet his Conductor who was right behind the plaintiff. His left leg then hit an object causing him to twist his body and he slipped down into a hole that was in the ground. The hole was between the No. 2 and No. 3 track. He had a lantern with him and it was lit. At times he observed where he was walking, but he also had to watch in all directions. He did not see the object before his foot hit it, but after his foot hit the object he saw that it was a piece of railroad tie which appeared to be about 1 to 1½ feet long and was stuck upwards at an angle. The condition in that area was very uneven containing gravel, air hoses, brakeshoes, knuckles and piles of grain as much as 2 feet high where the grain has slipped out of cars. There was all kinds of junk around there. It is the duty of the Maintenance of Way people to clean up this area. His leg was twisted because of the hitting of the object. He received a sharp pain, a jabbing pain, down his leg and his Conductor helped him back into the yard office to the Supervisor's office and he had to sit down there. The terminal trainmaster was mad at him because he had hit his leg again and he was taken to St. Charles Hospital. There he was instructed to see his orthopedic doctor (R. 123 through 128).

Wayne G. Oestreich, the fireman on May 6, 1976, testified for the plaintiff. He was sitting in the engine on the north side. The engine was on No. 3 track waiting for the crew which was to come out of the yard office. That office was to the south of the engine (R. 62). He saw Mr. Faircloth walking across in front of the unit. At that time, he said something and yelled up to the fireman telling him he was going to the north or west of the yard.

Faircloth proceeded north across No. 2 track and was looking down the main towards some cars. He then turned around and came back toward the engine. Between No. 2 and No. 3 track, Mr. Faircloth stepped on a piece of tie and the fireman saw his leg give out and then he hobbled back across in front of the engine. He then went into the yard office.

Mr. Oestreich testified that the area had been rough and the terrain had debris and stuff lying around for a couple of months (R. 63). He testified that the plaintiff stepped on a broken tie which is right about the middle between No. 2 and No. 3 track. He stated that a hunk of the tie was buried in the debris. A lot of excavating work had been done around there where it has been bad for a couple of months. There were potholes, gravel and that. That is all uneven gravel around there. He had observed the same condition for the preceding couple of months.

The condition was reported to one of the members of the Railroad Safety Committee. The fireman believed that he said something to the Safety Committee. The Safety Committee is composed of different men from different departments who are picked every 6 months to determine unsafe conditions around the railroad and to see what can be done to correct them. The only thing that was done to correct the condition was the placing of bulletins warning the men to watch the conditions. These were put up by the Superintendent (R. 65).

THE RAILROAD'S DEFENSE

The railroad presented no evidence, but, nonetheless, contended in its opening statement that the evidence would show that the two accidents ". . . were not the fault of the Norfolk & Western Railway" (R. 19). At the conclusion of the evidence, the railroad conceded that the plaintiff's evidence was presented by all the people who knew anything about the accident (R. 460). It claimed that the plaintiff must prove that a specific low joint was at the scene of the accident and that the low joint was the "cause of the whole thing" (R. 463). As to the second accident, the railroad argued that the sole cause of the accident was the carelessness of the plaintiff "in not watching where he was going" (R. 467).

THE HEARING ON THE POST TRIAL MOTION

The Post Trial Motion was extensively argued before the trial court. The plaintiff stated the applicable law involving the weighing of evidence on such a Motion (R. 513 through 539). The railroad, on the other hand, contended that a new trial could not be granted unless there was a complete absence of probative facts to support the conclusion of the jury (R. 539 through 541). Following the first hearing, the court asked for briefs which were filed.

On August 6, 1979, the Motion was reopened. The court stated that it had studied most of the cases that both sides submitted and that it was "very familiar with this proposition of law involved in these cases" (R. 560). After further argument as to the standard in a FELA case as to the weight of the evidence, the court ruled as follows (R. 570, 571):

> "THE COURT: The Court was not disturbed about the distinction as to standards of proof under

motions for a new trial and confusing that with a verdict non obstante verdicto, or setting aside a verdict, as some call it.

The Court is very familiar with the plethora of cases in Illinois and merely discussed Federal cases to see if there was any avenue at all that this Court could study and see as to what he should determine on this motion for new trial.

I have reached the conclusion that the motion for new trial is hereby denied in that the record itself speaks and the only one that can decide this matter is the Appellate Court.

MR. LANDESS: Thank you, your Honor.
MR. NAUGHTON: That is for all grounds?
THE COURT: On all grounds, yes.
If you will prepare your order, I will sign it."

HOW THE FEDERAL AND CONSTITUTIONAL QUESTIONS WERE PRESENTED

Petitioner asserted its position on his federal claims at every level of the court system.

Petitioner asserted its due process of law questions in his Petition for Rehearing after the Appellate Court handed down its Opinion.

Petitioner filed a timely Petition for Leave to Appeal to the Supreme Court of Illinois which was denied on January 30, 1981. Thus, the Appellate Court of Illinois, First District, First Division is the "highest court in [the] state in which decison could be had." 28 U.S.C. § 1257(3).

ARGUMENT

I.

THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN ITS SAFE PLACE TO WORK DECISIONS AND THE JUDGMENT BELOW BY REVERSING THAT JUDGMENT.

This Court's decisions have made clear beyond doubt that the common law duty of the employer to use reasonable care in furnishing its employees with a safe place to work is plain and is deeply engrained in Federal Jurisprudence. *Bailey* v. *Central Vermont Ry.*, 319 U.S. 350, 352, 353 (1943). The court below, however, was completely oblivious of this rule even though plaintiff's primary claim of negligence was based upon that rule. In ignoring that doctrine, the Appellate Court created an irreconcilable conflict with this Court's safe place decisions.

Plaintiff's two FELA cases were tried to a jury with all of the evidence part of the plaintiff's case (R. 459-460). Nevertheless, the jury aberrantly returned both verdicts in favor of the defendant. Since the plaintiff's case was uncontradicted and unimpeached, the verdicts demonstrated the jury did not understand the issues or the instructions. Even so, the Appellate Court affirmed the refusal of a new trial even though it admitted that the plaintiff's case was both uncontradicted and unimpeached (A. 1-10). The Opinion ignores this Court's teaching delineating the railroad's duty to provide a safe place to work by summarizing the evidence without mention of the rule and by rejecting all inferences favoring the plaintiff. Indeed, the

Appellate Court's Opinion finds inferences favoring the railroad by torturing the evidence and by creating contradictions where none exist.

Contrary to the Opinion, the evidence was overwhelmingly contrary to the verdicts. As to the first accident, the evidence clearly established the plaintiff was running alongside the cars in the cut and was performing his duties exactly as he was ordered to do by his Conductor. Furthermore, the track involved was in deplorable condition. It contained high-low joints, the cars were swaying laterally as a result of these joints and the general condition of the ballast supporting the track was poor. The plaintiff's testimony was that he reached for the operating lever while the cars were coming at him. The next thing he knew, he was lying on his back away from the cars (R. 100).

The Conductor observed the plaintiff throughout this movement. He then saw the plaintiff disappear between the cars and gave a stop signal. He saw the plaintiff come shooting out between the cars as though he were unconscious because no effort was made by the plaintiff to protect himself and he landed right on his head. When the Conductor ran up to the plaintiff, he held up 3 fingers and inquired how many fingers. He stated that Faircloth said 6 with a big smile on his face. The Conductor ordered the plaintiff to stay there and ran to a telephone to get an ambulance (R. 35, 36).

The basic charge of negligence presented to the jury was a charge that the railroad had failed to provide the plaintiff with a reasonably safe place in which to do his work. That charge was established without contradiction by the testimony of the Conductor on redirect examination as follows (R. 59):

"Q. It is necessary to run alongside of a car when you are making a cut movement like this?

A. Not necessarily so. Without the low joint, no, sir not necessary.

No instruction was given to the jury as to a claim that the accident was caused by a specific high-low joint. Nevertheless, the railroad argued that the plaintiff was required to prove that a high-low joint there was the cause of the whole thing (R. 463). That argument negated all of the claims of negligence submitted to the jury in the instructions. It placed upon the plaintiff the burden of proving a high-low joint contrary to the instructions. It directly led to the irrational verdict on the first accident.

The verdict in favor of the defendant on the second accident is even more incredible. As to that accident, the plaintiff and the fireman, who observed the accident, testified that the area between tracks 2 and 3 was littered with debris. Both testified that the plaintiff stepped over the rail of No. 3 track and his foot hit a piece of railroad tie which was buried in the debris causing the plaintiff to twist his knee. The piece of railroad tie was about 1 to 1½ feet long and it was stuck upwards at an angle. The fireman testified that striking the tie caused the plaintiff's leg to give out (R. 63, 64). The plaintiff stated that hitting the tie caused him to twist his body and slip down into a hole in the ground (R. 123 through 128).

Faced with the overwhelming evidence that the railroad had failed to provide the plaintiff with a reasonably safe place in which to work, the defendant argued that the area was so bad that the plaintiff was 100% to blame for his accident because he hit the tie. Its argument, thus, was contrary to the instructions of the court which place the burden of proving contributory negligence on the railroad.

Here, as in the first accident, the railroad sought to rely on speculation and conjecture and not upon evidence in order to argue that it was not negligent. The jury should have rejected such arguments, but did not. Even in a FELA case, no jury is permitted to use speculation and conjecture in order to supply a non-negligent explanation of the plaintiff's injury. *Moore* v. *C&O Railway,* 340 U.S. 573, 578 (1951).

The Appellate Court's confusion as to negligence was equaled by its confusion concerning the doctrine of partial causation explicitly provided in the Federal Employers' Liability Act. Its reasoning seemed to be based upon an ancient theory of proximate causation. No other explanation is possible for its holding that the railroad's unsafe place to work could be found to have no causal relation to the plaintiff's injuries. Thus, the reasoning of the Appellate Court must antedate the Opinion of this Court by Mr. Justice Holmes in *Union Pac. R. Co.* v. *Hadley,* 246 U.S. 330 (1918) where Mr. Justice Holmes specifically held that even if the plaintiff's negligence was the last in time, it cannot be deemed to be the only proximate cause because to do so would empty the statute of its meaning and say that the death there did not "result in part from the negligence of any of the employes."

II.

THE PETITIONER WAS DENIED DUE PROCESS OF LAW WHEN THE APPELLATE COURT AFFIRMED THE JUDGMENT WITHOUT DECIDING THE QUESTIONS RAISED ON APPEAL.

Petitioner appealed on two grounds:

1) The trial court abused its discretion in deciding the verdicts were not contrary to the preponderance of the evidence.

2) The Judgment should be reversed by the Appellate Court because the verdicts were contrary to the manifest weight of the evidence.

The Appellate Court failed to decide either question. Instead, it combined the two questions and held: "Even under the manifest weight standard urged by Faircloth, we do not believe the trial court abused its discretion in denying his motion for a new trial" (A. 7). No such question exists under either Federal or Illinois law. If such a question were to exist, it would effectively eliminate new trials because of the impossible burden such a test would impose on the movant. By combining the questions, the Court in effect agreed with the railroad that a new trial cannot be granted in a FELA case unless there is a "complete absence of probative facts" to support the verdict, which is the identical test required for a judgment notwithstanding the verdict.

The cavalier disregard of the questions raised on appeal compounded the nonsensical ruling by the trial court. That ruling was as follows (R. 570, 571):

> "THE COURT: The Court was not disturbed about the distinction as to standards of proof under motions for a new trial and confusing that with a verdict non obstante verdicto, or setting aside a verdict, as some call it.
>
> The Court is very familiar with the plethora of cases in Illinois and merely discussed Federal cases to see if there was any avenue at all that this Court could study and see as to what he should determine on this motion for new trial.
>
> I have reached the conclusion that the motion for new trial is hereby denied in that the record itself speaks and the only one that can decide this matter is the Appellate Court.

MR. LANDESS: Thank you, your Honor.
MR. NAUGHTON: That is for all grounds?
THE COURT: On all grounds, yes.
If you will prepare your order, I will sign it."

The correct standard for both courts is plainly stated in *Marsh* v. *Illinois Central R. Co.*, 5th Cir., 175 F. 2d 498, 500 (1949). Both courts refer to that case, but neither applied it. That failure deprived the petitioner of due process of law in and of itself.

The Opinion also decides that the trial court did not "fail to exercise discretion". This interpretation was mentioned as a mere possibility. The Opinion, however, increases that possibility because it relies on a colloquy which occurred before the trial court's ruling in order to so hold.

In summary, the Appellate Court decided questions never presented to it and did not decide the questions presented to it, but confusingly at times stated the contentions made by plaintiff-appellant correctly even though it did not decide those questions. Therefore, the Appellate Court Opinion does not satisfy the minimum standards required as to clarity, exposition and intelligibility. Because of the Appellate Court's failures, this Court should exercise its supervisory auhority over the lower appellate courts by granting the Petition for Certiorari in order to reverse the Judgment of the Appellate Court.

CONCLUSION

For the reasons adverted to above, it is respectfully submitted that this Court should grant the Petition for a Writ of *Certiorari.*

Respectfully submitted,

JOHN J. NAUGHTON,
30 N. LaSalle Street,
Suite 2100,
Chicago, Illinois 60602,
(312) 782-5925,

Counsel of Record.

ROBERT E. HARRINGTON,
HARRINGTON & HARRINGTON, LTD.,
HENSLEE, MONEK & HENSLEE,
30 N. LaSalle Street,
Suite 2100,
(312) 782-5925,

Of Counsel.

April, 1981

APPENDIX

No. 79-2391

CHARLES E. FAIRCLOTH,
Plaintiff-Appellant,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY,
a corporation,
Defendant-Appellee.

Appeal from the Circuit Court of Cook County
Honorable James A. Geroulis, Presiding.

Mr. JUSTICE JIGANTI delivered the opinion of the court:

The plaintiff, Charles E. Faircloth, filed a two count complaint against the defendant, Norfolk & Western Railway Company (Norfolk), under the Federal Employers' Liability Act (45 U.S.C. § 51 *et seq.*). He sought to recover for knee injuries allegedly resulting from two accidents which occurred while he was working for Norfolk. The jury found for the defendant on each accident. Faircloth appeals from the judgment entered on the verdicts and seeks a new trial on the ground that the verdicts were contrary to the manifest weight of the evidence. He also appeals from the denial of his post-trial motion for a new trial on the grounds that the court abused its discretion or refused to exercise its discretion.

Faircloth presented two occurrence witnessses on each accident and submitted evidence as to damages. Norfolk denied liability but presented no evidence. Due to our disposition, we find it unnecessary to relate the evidence concerning damages.

The first accident occurred on January 2, 1974 at Norfolk's Front Street yard in Ohio. Faircloth and his supervisor at the time of the accident testified concerning this accident.

Conductor Charles Fuller testified that on January 2, 1974, he was supervising the crew to which Faircloth was assigned. Faircloth reported to work on Fuller's crew about midway through the shift to replace a crew member who had left the job early due to illness.

Fuller instructed Faircloth that the crew was going to attempt a "three car kick". That is, three cars were to be separated from a fifteen car train and allowed to roll onto another track. Cars are detached from the rest of the train by lifting a cutting lever which is located between every two cars.

Fuller started the movement after Faircloth stated he was ready. Faircloth took two or three steps alongside the train which was moving at five to seven miles per hour. Fuller saw Faircloth put his hand on the grabhandle of the car. This is done so that the switchman can support himself while lifting the cutting lever. Faircloth reached between the cars as if to pull the cutting lever. He disappeared between the cars then came "shooting out," landing clear of the train.

Fuller testified that the condition of the track was "very poor on high-low joints". When asked to describe or define a high-low joint, Fuller related the following. A rail is 33½ feet long. At the end of each rail is a joint. The joint consist of a ballast, tieplate, and tie. The tieplate is two pieces of metal with a bolt through them. Under the tieplate is a tie. Under the tie is a ballast. A high-low joint occurs when, after years of wear, the ballast and ground are washed away causing the tie to eat into the ground.

This may cause a depression of up to 12 inches. The joint appears to be in good condition, but when heavily loaded cars roll over it they sink into the depression at the high-low joint. This causes the cars to swing violently.

According to Fuller, there were two high-low joints within 12 feet of one another in the area of the accident. Prior to the accident there had been 35 derailments in an unspecified 45 day period.

As Faircloth attempted the three car kick the cars were swinging violently. The cars were empty. Faircloth was right over a high-low joint as he reached between the cars for the cutting lever. Fuller did not see the high-low joint but he knew where it was located.

After the accident Fuller inspected the rail cars and found nothing the matter with them. There was nothing improper about the speed of the train or the actions of the crew members. At the time of the accident there were six inches of snow on the ground. No salt or other material had been spread on the snow.

On cross-examination Fuller testified that he had not been subpoenaed to testify but had appeared at Faircloth's request. He traveled from Toledo, Ohio to appear at trial. He no longer worked for Norfolk because he had been "disqualified".

Faircloth testified that he began working for the railroad in April of 1971. On the date of the accident he was employed as a switchman. He stated that he reported to work at approximately 5 p.m. on the date of the accident. Fuller told Faircloth that the crew was going to switch a string of cars and that the first movement would be a three car kick. Faircloth was instructed to lift the cutting lever and to hold it in order to make certain it stayed up. He was told

there had been trouble in the past with the lever staying up. He testified that the lever was supposed to stay up without being held but that given certain track conditions it must be held to keep it from falling down during a movement.

Fuller asked Faircloth whether he was ready and Faircloth answered that he was. The train started to move. He had his hand on the grab-iron and was walking alongside the train. He reached in to pull the cutting lever. He was not sure whether he actually got his hand on the lever or not. The cars were coming at him. The only thing he could remember at the time of trial was that he went in between the cars. The next thing he knew he was on his back. There was snow on the ground.

On cross-examination Faircloth testified that there was nothing improper about the speed at which the train was moving, or about what any of his fellow crew members may have done. He knew of nothing improper concerning the rail cars.

The second accident occurred on May 6, 1976 at Norfolk's Homestead yard in Ohio. Faircloth and a member of the crew testified concerning that accident.

Wayne Oestreich testified that on the date in question he was working as a fireman on the crew with Faircloth. Oestreich was sitting in the engine waiting for the crew to come out. He saw Faircloth cross in front of the engine. Faircloth turned around and started walking back towards the engine between the tracks. Faircloth stepped on a piece of broken tie which was partially buried. His leg gave out. Faircloth did not fall to the ground. Faircloth then hobbled back across in front of the engine and went into the yard office.

Oestreich testified that the area in which the accident occurred had previously been the scene of a derailment. The area was undergoing repair and excavation work. The ground was "rough" and there was debris strewn about. There were potholes, gravel and uneven ground. A warning had been posted stating that repair work was being conducted and that the track in the area was closed to traffic.

The condition had existed for "a couple of months". The witness had reported the condition to members of the Safety Committee. To the witness' knowledge the only action that had been taken in response to the complaints was the posting of the warning.

On cross-examination, the witness testified that he could see the piece of broken tie on which Faircloth had stepped. He was 10 or 15 feet away. There was a spotlight shining, so the visibility was good from where he had been sitting. Visibility from the ground would not have been as good because of "shadows".

Faircloth testified that he was walking between the tracks. He made a turn to come back to meet his conductor. The conductor was right behind him before he turned. Faircloth's left leg hit an object causing him to twist his body. He slipped into a hole.

Faircloth and the conductor were each carrying a lighted lantern. He was looking where he was walking, but he could not walk with his head all the way down because he had to watch for trains.

After his foot hit the object he saw that it was a piece of broken tie. It was a foot and a half long and protruded from the ground between the tracks.

According to Faircloth's testimony the condition of the area where the accident occurred was very uneven. There

was debris on the ground including gravel, air hoses, brakeshoes, knuckles, and grain. At the time of the second accident the yard was not really dark but neither was it very well illuminated. He did not see the tie before he stepped on it. There were shadows from engines and box cars which would have prevented him from seeing the tie even if he had looked at it.

Faircloth's initial arguments concern the sufficiency of the evidence. He contends first that the jury verdicts were against the manifest weight of the evidence and secondly that the trial court abused its discretion in not granting his motion for a new trial which alleged that the verdicts were against the manifest weight of the evidence. He argues that the controlling standard was set forth in *Marsh* v. *Illinois Central R.R. Co.*, (5th Cir. 1949), 175 F. 2d 498, 500 wherein the court stated:

> "A motion for a new trial is addressed to the trial judge's discretion. He may grant a new trial * * * (and he alone can) because he thinks the verdict is wrong, though supported by some evidence. The exercise of his discretion is not ordinarily reviewable on appeal, though a failure to exercise discretion, or an abuse of it, may be corrected".

Faircloth also relies upon the following statement in *Bazile* v. *Bisso Marine Co.*, (5th Cir. 1979), 606 F. 2d 101, 105:

> "As far as the motion for a new trial, the trial judge can grant a new trial if he believes the verdict is contrary to the weight of the evidence. [Citations.] * * * In a motion for a new trial the judge is free to weigh the evidence. As an appellate court, our review of the granting of the motion for a new trial is severely limited — the lower court's action is discretionary and we may interfere only when the court abuses its discretion or fails to exercise it".

Norfolk argues that manifest weight is not the controlling standard but rather that in Illinois a new trial may be granted only where there is a complete absence of probative facts to support the verdicts. *Bowman* v. *Illinois Central Railroad* (1959), 11 Ill. 2d 186, 142 N.E. 2d 104.

Under either standard, our review of the denial of Faircloth's motion for a new trial is, as stated in *Bazile* "severely limited". Even under the manifest weight standard urged by Faircloth, we do not believe the trial court abused its discretion in denying his motion for a new trial. Accordingly, we will not disturb on appeal the trial court's denial of the motion for a new trial or its determination that the jury's verdicts were supported by the evidence.

Concerning the first accident, the witnesses agree that there was nothing improper concerning the speed of the train, actions of the crew members, or condition of the rail cars. Although there was testimony that there were six inches of unsalted snow on the ground there is nothing in the record to indicate that this condition bore any relationship to the accident.

Fuller testified that there were high-low joints in the track in question, that high-low joints cause the cars to swing violently, and that the cars were at the time of the accident swinging violently. Faircloth did not mention high-low joints or whether the cars were swinging. There was no testimony as to whether the presence of high-low joints or the swinging of the cars related to the accident. Neither witness testified that Faircloth was struck, pulled, pushed or caught by the cars. Further, Fuller's testimony in this regard was somewhat contradictory. He stated that rails are 33½ feet long and that joints occur where the rails meet. His subsequent testimony was that there were

two high-low joints within 12 feet of one another in the area in question. He testified that when heavily loaded cars roll over high-low joints a violent swinging action occurs. Here, the rail cars were empty. Additionally, the jury was entitled to consider that Fuller had been disqualified for work by the defendant railroad after 22 years of employment. Faircloth, testifying on his own behalf, was no longer employed by Norfolk.

Concerning the second accident, Oestreich testified that Faircloth stepped on a piece of tie and that Faircloth's leg then gave out. The area was undergoing repair, was the scene of excavation work, and was littered with debris. Faircloth testified to similar facts except that instead of testifying that his leg gave out, Faircloth stated that after his leg hit the tie his body twisted and he slipped into a hole. The evidence was somewhat contradictory. While Oestreich testified that a bulletin had been posted warning of conditions and stating that the track was closed to traffic, Faircloth testified that he could not look toward the ground constantly while he was walking because he had to be alert for the movement of trains. Additionally, Faircloth stated that poor lighting would have kept him from seeing the tie although he and the conductor he had been walking with each carried a lighted lantern. The jury also heard Oestreich testify that a light was shining on the tie from where he was sitting but that from Faircloth's position the tie was in shadows.

Faircloth also contends that the trial court failed to exercise discretion when ruling on his motion for a new trial. This contention is based on the following statement made by the trial court:

> "I have reached the conclusion that the motion for new trial is hereby denied in that the record itself speaks and the only one that can decide this matter is the Appellate Court".

A similar contention was made in *Asher* v. *Stromberg* (1966), 78 Ill. App. 2d 267, 223 N.E. 2d 300, in which the jury held for the defendant and the trial judge denied the plaintiff's motion for a new trial, remarking "I have to await the ruling of a higher court." (*Asher* at 276, 223 N.E. 2d at 304). The appellate court, considering all of the trial court's comments in context, rejected the plaintiff's contention that the trial judge had erroneously concluded that he had no authority or power to weigh the evidence.

Here, the trial court requested and received legal memoranda on the motion from counsel for each party. It heard argument on the issues. The court stated that he had read most of the cases submitted and was "very familiar" with the proposition of the law involved. Additionally, the trial court and plaintiff's counsel agreed on the record that the trial court was not refusing to exercise its discretion. This is evidenced by the following colloquy which occurred at the hearing on Faircloth's motion:

> "THE COURT: But the limitation [on the court's discretion in ruling on a motion for a new trial] only is that he cannot abuse his power and discretion.
> COUNSEL FOR THE PLAINTIFF: That is the only limitation on the Trial Court.
> THE COURT: Yes.
> COUNSEL FOR PLAINTIFF: And the Marsh case goes further and says that when the Judge refuses his discretion it can be remanded to him and he must exercise the discretion.
> THE COURT: We don't have that element involved here.
> COUNSEL FOR PLAINTIFF: No."

Considering all of his remarks in context, we are not persuaded that the trial judge believed he had no authority to exercise discretion or that he refused to exercise his discretion. Rather, we believe the trial court's comment, when viewed in context, was meant only to indicate that having made its ruling on the motion for a new trial the unsuccessful litigant was left with the option to appeal.

Accordingly the judgment of the circuit court is affirmed.

Affirmed.

JOHNSON and ROMITI, JJ., concur.

UNITED STATES OF AMERICA

STATE OF ILLINOIS }
SUPREME COURT } ss.

AT A TERM OF THE SUPREME COURT, begun and held in Springfield, on Monday, the twelfth day of January in the year of our Lord, one thousand nine hundred and eighty-one, within and for the State of Illinois.

PRESENT: JOSEPH H. GOLDENHERSH, CHIEF JUSTICE

JUSTICE ROBERT C. UNDERWOOD

JUSTICE HOWARD C. RYAN

JUSTICE THOMAS J. MORAN

JUSTICE DANIEL P. WARD

JUSTICE WILLIAM G. CLARK

JUSTICE SEYMOUR SIMON

TYRONE C. FAHNER, ATTORNEY GENERAL

LOUIE F. DEAN, MARSHAL

ATTEST: CLELL L. WOODS, CLERK

BE IT REMEMBERED, that, to-wit: on the 30th day of January, 1981, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

CHARLES E. FAIRCLOTH, *Petitioner,* No. 54267 vs. NORFOLK AND WESTERN RAILWAY COMPANY, a corporation, *Respondent.*	Petition for Leave to Appeal from Appellate Court, First District. — 79-2391 75 L 10099

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

And it is further considered by the Court that the said Respondent recover of and from the said Petitioner costs by it in this behalf expended, to be taxed, and that it have execution therefor.

I, CLELL L. WOODS, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court this 9th day of April, 1981.

CLELL L. WOODS, Clerk,
Supreme Court of the State of Illinois.

ALEXANDER L. STEVAS
CLERK

No. 80-1833

IN THE

Supreme Court of The United States

OCTOBER TERM, 1980

CHARLES E. FAIRCLOTH,

Petitioner,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, First District, Fourth Division

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT L. LANDESS*
TOBIN M. RICHTER
ROSS, HARDIES, O'KEEFE
BABCOCK & PARSONS
One IBM Plaza, Suite 3100
Chicago, Illinois 60611
(312) 467-9300

Attorneys for Respondent

*Counsel of Record

MAY, 1981

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RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTORY STATEMENT

The respondent, Norfolk and Western Railway Company, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the decision of the Illinois Appellate Court, First District, Fourth Division. That opinion is reported at 89 Ill. App. 3d 923, 412 N.E.2d 634 (1980).*

* Petitioner incorrectly asserts that the case was heard by the First District, First Division. Petitioner erroneously indicates the case citation as 414 N.E.2d 634 (1980).

STATEMENT OF THE CASE

The petitioner seeks a writ of certiorari to review the decision of the Illinois Appellate Court. The opinion affirmed the judgment of the trial court. The trial court entered judgment on a jury verdict which was adverse to the petitioner. The petitioner in his Statement of Facts has distorted the facts and history of this case. In addition the Statement of Facts is in part argumentative. Petitioner's case was not uncontradicted and unimpeached in the trial court. Instead of undertaking to correct the petitioner's distortions respondent directs this Court's attention to the opinion of the Illinois Appellate Court (Appendix A to the Petition for Certiorari, pp. A2-A6, A7-A8), in which the facts are impartially and accurately set forth and analyzed.

Petitioner's statement that the Appellate Court's opinion is confusing is not borne out by a reading of the opinion.

REASONS FOR DENYING THE WRIT

A. There Is No Conflict Between The Judgment Of The Trial Court Or The Opinion Of The Appellate Court And The "Safe Place To Work Decisions."

Petitioner argues that some aspect of this case is in conflict with the requirement that the railroad provide a reasonably safe place to work; a requirement noted by this Court in *Bailey* v. *Central Vermont Ry.*, 319 U.S. 350 (1943). Petitioner, however, does not specify the nature of the conflict. Petitioner is either arguing that the jury's verdict, which the trial court refused to set aside, conflicts with *Bailey* v. *Central Vermont Ry., supra,* or that the opinion of the appellate court conflicts with that case; it is not clear which. But, either hypothesis is unconvincing.

If petitioner's argument is that the jury verdict is wrong then he presents a pure question of fact to this Court. All questions of the respondent's alleged negligence, including whether the railroad provided a safe work place, went to the jury in this case—just as this Court in *Bailey* held that they should.

The trial court expressly instructed the jury that:

> It was the duty of the Norfolk and Western Railway Company, to use ordinary care to provide plaintiff with a reasonably safe place in which to do his work at the time of each occurrence. (Plaintiff's instruction 11)

The court also instructed the jury that one of plaintiff's claims as to defendant's negligence was failure to use ordinary care to provide plaintiff with a reasonably safe place in which to work (Plaintiff's instruction 16). Thus, at trial, it was the jury that resolved that factual issue adversely to petitioner. This Court has declined to grant certiorari to reexamine or to determine controverted questions of fact in cases having no other issue. *Houston Oil Company of Texas et al* v. *Goodrich Service Co.*, 245 U.S. 440, 441 (1918); *Southern Power Co.* v. *Public Service Co.*, 263 U.S. 508, 509 (1924).

If, on the other hand, petitioner asserts that the "conflict" is with the opinion of the Illinois Appellate Court it must be noted that this case has never presented an issue as to whether the railroad had the duty as set forth in *Bailey*, *supra*, and nothing in the opinion of the appellate court deviates from the "safe place to work decisions." It must also be noted that petitioner did not argue, at any stage below, to the appellate court that the trial court had erred in any manner in failing to follow the "safe place to work decisions." The Appendix hereto shows the issues raised below by petitioner and reveals that no argument relating to the "safe place to work decisions" has been made before in this case. Thus, petitioner has waived this issue, if indeed it exists.

The real basis of petitioner's argument, which is made in the guise of a "conflict of decisions" argument for purposes of the petition for certiorari, is stated in the petition for certiorari on page 14:

> Contrary to the Opinion, the evidence was overwhelmingly contrary to the verdicts.

This, in fact, is petitioner's "conflict" argument. It does not raise a question of conflict between decisions or even a question of

law. Petitioner asks nothing more of this Court than that it weigh the evidence, a task already performed in the instant case by the jury, the trial judge and the appellate court; each arriving at the same conclusion.

B. The Appellate Court Issued An Opinion Deciding All The Questions Raised On Appeal.

Petitioner's due process argument seems to be a complaint about how the Illinois Appellate Court responded to the issues he raised before it; he argues that the issues which he presented to the Illinois Appellate Court were somehow ignored. Even if petitioner were correct in his protestations that an issue was left unaddressed in the opinion below, he would not have been deprived of due process. The fact that an appellate court decides a case adversely to an appellant is not in itself a violation of the due process clause. Petitioner's due process theory would raise to a constitutional level the dissatisfaction with an appellate ruling which almost every losing litigant experiences.

In any event, petitioner has advanced no discernable due process claim. Tribe, American Constitutional Law, p. 543, §10-14 (1978), notes:

> The Court has long maintained its adherence to a flexible approach in deciding what process is due. . . . There has nevertheless been considerable regularity in the procedural safeguards prescribed, since the determination of what process is due has centered on an adversary model whose core constant has involved granting notice and an opportunity to be heard to those individuals or groups whose personal interests are adversely affected by government action. (Footnotes omitted.)

Here the petitioner, represented by experienced counsel, had an error free trial by jury, an extensive hearing on a post trial motion, an appeal, a petition for rehearing to the appellate court and a petition for leave to appeal to the Illinois Supreme Court.

The fairness of petitioner's trial is corroborated by the fact that the petitioner does not suggest that the trial court erred in any ruling as to testimony, deprived him of any jury instruction he sought on the issues now presented, or precluded him from making any motion or argument he desired to make. Contrary to the puzzling argument of petitioner the Illinois Appellate Court fully resolved this case.

C. The Federal Questions Now Asserted By The Petitioner Were Not Presented To The Court Below And Are Therefore Not Preserved On Appeal.

The petitioner has not complied with Rule 21.1(h) of this Court with regard to specifying how the federal questions sought to be reviewed were raised, the method of raising them, the way they were passed on, and pertinent quotations of specific portions of the record with specific references to places in the record where the matter appears.

In point of fact the petitioner did *not* suggest in his Petition for Rehearing to the Illinois Appellate Court or in his Petition for Leave to Appeal to the Illinois Supreme Court that there was a conflict between any aspect of the instant case and this Court's "safe place to work decisions." Petitioner's nebulous assertion that the due process clause is involved in this case has not been made before. The Appendix hereto shows the issues raised below by petitioner at each stage of the proceedings. Those issues make it clear that the questions presented to this Court were not presented by petitioner below.

CONCLUSION

For these reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT L. LANDESS*
TOBIN M. RICHTER
ROSS, HARDIES, O'KEEFE,
BABCOCK & PARSONS
One IBM Plaza, Suite 3100
Chicago, Illinois 60611
(312) 467-9300

Attorneys for Respondent

*Counsel of Record

APPENDIX

ISSUES PRESENTED ON APPEAL BY PETITIONER TO THE ILLINOIS COURTS

A. The issues presented for review by petitioner to the Illinois Appellate Court were as follows (Appellant's Brief, p.2):

ISSUES PRESENTED FOR REVIEW

1. Were the verdicts contrary to the manifest weight of the evidence?

2. Did the denial of the Post Trial Motion constitute an abuse of discretion where the trial court ruled ". . . . that the record itself speaks and the only one who can decide this matter is the appellate court" (T. 572)?

3. Did the trial court refuse to exercise its discretion on the questions of law and on the questions of the weight of the evidence presented to it when it wholly failed to address such matters?

B. The three questions presented to the Illinois Appellate Court on petition for rehearing where (Appellant's Petition For Rehearing, pp. 2, 9, 11):

I. The court overlooked plaintiff's first point on appeal. Instead, it decided a point never raised by the plaintiff.

II. The trial court abused its discretion by holding that the verdicts were not contrary to the preponderance of the evidence.

III. This court decides a contention that plaintiff never made by finding that the trial court exercised its discretion and based its finding in part on a non-existent concession.

C. The points made to the Illinois Supreme Court were as follows (Petition For Leave To Appeal, p. 2):

> Points relied on to reverse the judgment of the Appellate Court.
>
> 1. The Appellate Court affirmed the judgment, but did not consider whether justice was done below. It thus avoided fundamental questions raised as to sufficiency of the evidence to support the verdicts.
>
> 2. The Appellate Court abdicated its jurisdiction by not deciding the plaintiff's first point on appeal: that the verdicts were contrary to the manifest weight of the evidence in a case where there was no defense evidence. Instead, the Appellate Court decided a point never raised: that the trial court had not abused its discretion in making a non-existent determination that the verdicts were not contrary to the manifest weight of the evidence. The opinion is the only one linking an abuse of discretion with a manifest weight of the evidence point.
>
> 3. The Appellate Court did not discuss the only abuse of discretion question presented which was that the trial court had abused its discretion in deciding that the verdicts were not contrary to the preponderance of the evidence in a case in which the defendant presented no evidence.